MOHAMED JAAFAR v. SULAIMAN & ANOR.

[O.C.J. (Chang Min Tat J.) July 29, 1969]

[Ipoh — Election Petition No. 5 of 1969]

Election — Voting — Ballot papers — Discrepancy between total of votes counted and ballot papers in ballot boxes — Recount — Whether returning officer had duty to order recount — Whether result of election would have been affected — Election Offences Act, 1954 (Laws of Malaysia Act 5) s. 32(b) — Elections (Conduct of Elections) Regulations, 1959, regs. 25(8) and 31.

This was an election petition to declare that the election of the successful candidate was void on the ground that he was not duly elected and returned. The facts were that there was a discrepancy between the aggregate number of ballot papers found in the ballot boxes and the total of the votes counted or cast. The returning officer had not ordered a recount as the result of the election would not have been affected.

Held: (1) on a proper interpretation of reg. 25(8) of the Elections (Conduct of Elections) Regulations, 1959, a returning officer is bound upon application to order a recount in the circumstances of any one of the three conditions described in the provisoes to the regulation;

(2) in this case there was no demand by the petitioner on the returning officer to order a re-count on the ground specified in proviso (b) of reg. 25(8), but in any event the petitioner had not shown that the result would have been affected or different and therefore the petition must be dismissed.

Case referred to:—

(1) *Woodward* v. *Sarsons & Anor.* (1875) 32 L.T. 867; s.c. L.R. 10 C.P. 733; [1874-80] All E.R. Rep. 262.

ELECTION PETITION.

O. Phipps for the petitioner.

Abdul Rahim Noor for the 1st respondent.

Sheikh Abdul Rahman (Legal Adviser, Perak) for the 2nd respondent.

Chang Min Tat J. (delivering oral judgment): In this election petition, the petitioner who was the unsuccessful candidate in the Parliamentary Election for the Constituency of Krian Laut, sought for an order declaring that the election of his opponent was void on the ground that he was not duly elected or returned. A second prayer was included for a scrutiny, but when the case came up for hearing this morning, Mr. Oliver Phipps did not persist in this prayer. The petition set out the following facts:—

(1) The aggregate number of ballot papers found in the various ballot boxes was 22,983.

(2) The votes cast for Sulaiman bin Haji Taib, the first respondent was 11,092. The votes cast for the petitioner was 10,792. Spoilt votes were 1,162. The total of votes cast was therefore 23,047. This disclosed an excess of 64 ballot papers counted over the number of 22,983 ballot papers duly recorded as found in the ballot boxes.

The petitioner went on to say that this was a highly suspicious discrepancy indicating some serious electoral offence and because the majority of 300 was so small, the refusal of the returning officer for a re-count was wrong.

It is common ground that a re-count was requested and refused. On this admission, Mr. O. Phipps, counsel for the petitioner, elected to call no evidence and chose to rely on this admission.

At the outset of the case, the petitioner through his counsel made it clear that he was in no way alleging any impropriety or improper motives on the part of the elected candidate or the returning officer, though he had to join the latter as a respondent in view of his refusal to order a re-count. I am sure that this assurance was most welcome to the respondents. For myself, I am most happy that this petition is conducted in such a gentlemanly manner and I congratulate him and his counsel.

Before me, Mr. Phipps contended that the difference between the number of the votes cast for the successful candidate and the number of the votes cast for the petitioner, i.e. the majority in this bi-lateral election was only 300 and that since this difference was 2% or less of the total number of votes cast, which was 22,983, the number of votes in the ballot boxes or 23,047, the number of votes counted, inclusive of the rejected votes, the refusal of the returning officer was a breach of his mandatory duty, and that any declaration of the successful candidate without such a re-count was illegal and void. It was submitted that no election had therefore been made.

The petition deals with the perennial question what rules or regulations are mandatory and what are not and the effect of the breach of any of these rules. It will be convenient at this stage to set out the relevant provisions.

Section 32(b) of the Election Offences Act 1954 as amended reads as follows:—

"32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge:

.....

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election."

The written law that was alleged not to have been complied with was regulation 25(8)(b) of the Elections (Conduct of Elections) Regulations 1959 as amended by the Elections (Conduct of Elections) (Amendment) Regulations 1968. Now regulation 25(8) reads as follows:—

"25.(8) When the counting of the votes has been completed the returning officer shall forthwith declare as having been elected the candidate to whom the greatest number of votes is given:

Provided that:—

(a) if the number of votes for all the candidates together with the rejected votes varies from the number of ballot papers found in the ballot boxes by one per centum or more, or

(b) if the difference between the number of votes cast for the leading candidate and the number of votes cast for the next leading candidate is two per centum or less of the total number of votes cast,

then, upon the application of either any candidate or of his election agent, a recount shall be made once only before the returning officer makes his declaration under this paragraph:

Provided further that the returning officer may in his discretion order a recount or recounts to satisfy himself as to the correct result of the poll."

Mr. Phipps for the petitioner drew my attention to the fact that the provisoes (a) and (b) to regulation 25 were only brought into force by *Gazette* Notification P.U.(A) 25 of 1969 on 16th January, 1969, and that the discretion previously given under the old regulation is now replaced in part by the statutory duty on the part of the returning officer to order a re-count upon the happening of the events in either (a) or (b). It was his contention that the provisoes (a) and (b) are disjunctive and that the duty immediately arose in any one of the two events upon the application of any candidate or his election agent.

Mr. Abdul Rahim Noor for the first respondent submitted that these provisoes are not cumulative by which he said he meant that, if the returning officer was satisfied that either of the provisoes had been complied with, then he was entitled to use his discretion to forthwith declare the candidate successfully elected, even though the other proviso might not have been complied with.

Of the two interpretations, I am of the view that the construction put on this regulation by Mr. Phipps is with respect the correct one. On a proper interpretation of regulation 25(8) a returning officer is bound upon application to order a recount in the circumstances of any one of the two conditions described in the provisoes.

This interpretation, in my view, is in accord not merely with the plain grammatical language of the section but also with the intention of the Legislature as clearly seen when a comparison is made between the language of the repealed regulation and that of the present regulation.

Mr. Abdul Rahim Noor, however, relied on regulation 31 which is in these words:—

"31.(1) No election shall be invalid by reason of any failure to comply with any provisions of these Regulations relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provisions, and that such failure did not affect the result of the election.

(2) Where in these Regulations any act or thing is required or authorised to be done in the presence of the candidates or their agents, the non-attendance of any candidate or agent at the time and place appointed for the purpose shall not, if that act or thing is otherwise duly done, invalidate that act or thing."

On a proper interpretation, regulation 31 read together with section 32(b) of the Act clearly establishes that non-compliance either with the provisions of any written law relating to any elections or with any of the regulations relating to elections is *per se* not fatal unless the election has not been conducted in accordance with the principles laid down in such law and such non-compliance affects the results of the election. The only difference, as far as I can see, between section 32(b) and regulation 31(1), is that the section is in positive and the regulation in negative language. Before an election court can declare any election void for reasons of non-compliance with the provisions either of any written law or of any regulations relating to elections, it must be satisfied, among other things, that the failure of compliance affects the results of the election.

I find confirmation in what I believe to be the proper interpretation in the judgment of the Court of Common Pleas delivered by Lord Coleridge C.J. in the case of *Woodward v. Sarsons & Anor.*[1] at p. 873.

This case which was founded on alleged wrongful markings of ballot papers was decided on the issue whether the irregularities which had been proved rendered the election void under the provisions of section 13 of the Ballot Act 1872, which is in almost identical words with our section 32(b).

What Lord Coleridge C.J. said was this:—

"It is said that section 13, though it is in negative form, assumes as an affirmative proposition, that a non-compliance with the rules or any mistake in the use of the forms, would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election. If this proposition be closely examined, it will be found to be equivalent to this — that the non-observance of the rules or forms, which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of voters, or in other words, the result of the election."

When I come to the facts of this case, I find that Mr. Phipps relied on regulation 25(8)(b) which was, however, not advanced in his petition and, after I heard the testimony of the returning officer, I find that it was a ground not relied on by the petitioner or his election agent at the time of the count. The evidence was that

the petitioner who was at the count, was not satisfied with the excess of 64 votes between the number counted and the total number of the votes in the ballot boxes. The returning officer said that on the question of this discrepancy he refused a re-count because under regulation 25(8)(a) the discrepancy of 64 did not exceed 1% or more, of the votes cast for the two candidates. He took into consideration that even if the 64 excess votes had been abstracted from the total for the successful candidate and given to the petitioner, it would not have affected the result. He therefore refused the request for a re-count under regulation 25(8)(a). Apparently he did not also think it necessary to exercise his general powers to order a re-count.

He denied that any demand for a re-count was made on the ground specified in proviso (b). His evidence was not challenged substantially on this point. In my view, the returning officer was perfectly correct in his interpretation of regulation 25(8)(a) and in his arithmetical appreciation of the state of the voting. In my view, too, if no application under regulation 25(8)(b) was made, then he could not be said to have failed to discharge his duties or be charged with failing to order a re-count, even if the difference between the number of votes cast for the first respondent and the number of votes cast for the petitioner was 2% or less of the total number of votes cast. This is particularly so as the rule especially provides that the application for a re-count must be made by a candidate or his agent. In other words, in the absence of any demand by the petitioner for a re-count under proviso (b) of regulation 25(8), then no duty was cast on the returning officer to order a re-count and he could not be said to have failed to observe this provision of law regarding elections.

Further, even if the petitioner had properly exercised his right to a re-count under regulation 25(8)(b) and had indicated his intention with sufficient clarity to the returning officer or even if the petitioner could be heard by me on a ground he did not advance either at the count or in his petition, he still had to show that the result would have been affected or different and this he had singularly failed to do.

The petition therefore fails. It is dismissed with costs.

Petition dismissed.

Solicitors: *Lim Ewe Hock; Maxwell, Kenion, Cowdy & Jones.*

LAU FOO SUN v. THE GOVERNMENT OF MALAYSIA

[O.C.J. (Gill F.J.) July 30, 1969]

[Kuala Lumpur — Civil Suit No. 116 of 1963]

Copyright — Literary work — Whether drawings prepared by engineer constitute original literary work — Copyright Enactment (F.M.S. Cap. 73) ss. 2, 3 & 4.

The plaintiff, a chartered civil and structural engineer, claimed a declaration that he was entitled to the copyright in all documents and drawings prepared by him for the construction of schools for the Government.

Held: on the facts the plaintiff, in preparing the drawings, had substantially copied from P.W.D. drawings and therefore the plaintiff's drawings though they come within the meaning of "literary work" in the Enactment, were not original literary work so as to qualify for a copyright.

Cases referred to:—

(1) *Walter* v. *Lane* [1900] A.C. 539, 548.

(2) *University of London Press, Limited* v. *University Tutorial Press, Limited* [1916] 2 Ch. 601, 608.

(3) *Blackie & Sons Limited* v. *The Lothian Book Publishing Company Proprietary Limited* (1921) 29 C.L.R. 396.

(4) *Inala Industries Pty. Ltd. & Ors.* v. *Associated Enterprises Pty. Ltd.* [1960] Qd.R. 562, 569.

CIVIL SUIT.

S.D.K. Peddie for the plaintiff.

Au Ah Wah (Senior Federal Counsel) and subsequently *Ajaib Singh* (Senior Federal Counsel) for the defendant.

Gill F.J.: The plaintiff is a chartered civil and structural engineer carrying on business in Kuala Lumpur as a consultant under the name and style of "Lau & Partners". His claim in this action is for a declaration that he was until the 23rd day of January, 1963 solely entitled to and the owner of the copyright in all documents and drawings produced by him for the defendant pursuant to two contracts between him and the Permanent Secretary to the Ministry of Education on behalf of the defendant dated the 10th day of February, 1961 and the 22nd day of March, 1961 respectively, and that from and after the 23rd January, 1963 he was solely entitled to and the owner of the copyright in all the aforesaid documents which were not purchased by the defendant on that date. He is also claiming other and consequential reliefs including damages for infringement of copyright.

Under the terms of the contract dated 10th February, 1961 the plaintiff was to prepare designs and drawings for the construction of Sekolah Tun Fatimah in Johore Bahru. The contract dated 22nd March, 1961 was in respect of the design programme of the Ministry of Education for 1961. It covered any work